TORT — NEGLIGENCE — LIABILITY OF CONTRACTOR TO THIRD PARTIES. — Under a contract with county commissioners, a bridge company, knowing of latent defects in a bridge, turned it over to the commissioners, who opened it for public use. The plaintiff, a stranger to the building contract, in passing over the bridge sustained personal injuries due to the latent defects. *Held*, that the bridge company is liable to the plaintiff for the injuries suffered. *Casey* v. *Hoover*, 89 S. W. Rep. 330 (Mo., Kansas City Ct. App.). See NOTES, p. 372.

WASTE — RIGHT OF LIEN-HOLDER TO BRING ACTION AT LAW. — The defendant, being in possession of land upon which, as he knew, rested a heavy lien for unpaid taxes, removed a building, thereby rendering the real estate insufficient to answer for the assessments. *Held*, that he is liable to an action for waste at the suit of the county. *Lancaster County* v. *Fitzgerald*, 104 N. W. Rep. 875 (Neb.).

An injunction against such waste as would impair the security has been obtained by a judgment creditor with a lien upon land, and by one who has levied an attachment before suit begun. *Jones* v. *Britton*, 102 N. C. 166; *Camp* v. *Bates*, 11 Conn. 50. The law which gives a lien must, to give it value, protect it from the danger of interference which may result in injury to the plaintiff. On the other hand, it has been frequently said that to support a common law action of waste, or in the nature of waste, a legal title is necessary. See *Webb* v. *Boyle*, 63 N. C. 271. Yet a mortgagee has been allowed to sue even in states where he secures only a lien upon the mortgaged property. *Van Pelt* v. *McGraw*, 4 N. Y. 110; *Jackson* v. *Turrell*, 39 N. J. Law 329. A lienholder possesses a substantial interest, so that at least where a defendant has, as in the principal case, knowingly impaired that security-interest by conduct not in the ordinary enjoyment of the premises, he seems to have committed a tort which should render him liable. See *Yates* v. *Joyce*, 11 Johns. (N. Y.) 136.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

LIABILITY OF STOCKHOLDERS AS PARTNERS WHEN INCORPORATION IS DEFECTIVE. — A recent article attempts to place upon a reasoned basis this doctrine, which some courts have adopted as a desirable result. *Are Defectively Incorporated Associations Partnerships?* Francis M. Burdick, 6 Columbia L. Rev. 1 (Jan., 1906). The writer maintains that a creditor of a supposed corporation, upon discovering the incorporation to be defective, can sue the stockholders as partners upon the principle by which a creditor of a partnership recovers against a dormant partner. Where shares of stock are issued but the attempt to incorporate fails, there is lacking no element necessary to a partnership in fact if "the common business is carried on with the capital thus contributed; by agents designated by the contributors in accordance with the will of the contributors and for their profit." If these elements are present, the absence of an "intention to incur the liabilities of partners . . . does not prevent the existence of a partnership." Professor Burdick denies that any reason exists for applying the rule that the validity of a corporation shall not be attacked collaterally, in an action to charge the stockholders with partnership liability.

The majority of the American decisions deny the existence of this general liability of stockholders as partners when incorporation is defective. See BURDICK, PARTNERSHIP 34. That no such liability is incurred by stockholders who succeed in creating a corporation *de facto* seems now to be well established. *Stout* v. *Zulick*, 48 N. J. Law 599; *Finnegan* v. *Noerenberg*, 52 Minn. 239. Professor Burdick's argument against the application of the rule prohibit-

ing collateral attack upon the validity of a corporation *de facto*, seems to indicate that he regards even shareholders in a corporation *de facto* as partners; and this view is expressly stated in his treatise on Partnership (pp. 33, 34). This statement, however, leads to the result that both a partnership in fact and a corporation *de facto* exist, in each of which the property acquired in the course of the business would vest. The writer's test of a partnership quoted above seems also to be equally well satisfied whether or not the stockholders succeed in organizing a corporation *de facto*.

Professor Burdick very properly points out the fallacy of assuming that a partnership in fact is not formed because the individuals associated intended not to incur the liability of partners. In his treatise (p. 15) he identifies the "specific intent to form a partnership" and the "specific intent to incur the liabilities of partners," and decides that neither "is necessary to the existence of a partnership." In the present article he states that "the partnership relation cannot be instituted without the assent of the parties thereto." Just what is meant by assenting to the formation of the partnership relation without specifically intending its formation, is not clear. It is submitted that although it is not necessary that parties intend to incur partnership liability, it is necessary that they intend to form the relation which the law calls a partnership. The relations of shareholder to corporation and of partner to firm are each a distinct *status;* each is a distinct relation in fact to which the law annexes certain rights and liabilities. The intention not to incur a certain form of liability for an act can no more enable a person entering into the partnership relation to escape the liability of a partner than it can enable a person entering into the marital relation to escape liability for certain debts contracted by his wife. In each case the individual merely mistakes one of the legal consequences of his act of assenting to enter into the relation; but because the law attaches to an act a consequence not specifically intended does not render it less necessary that the act itself be intended in order to give it any legal effect. Whether an individual assents to enter into the partnership relation is obviously a question of fact. The validity of Professor Burdick's proposition requires this conclusion of fact: that an individual by the mere act of purchasing a share of stock in a concern engaged in business, which he honestly believes to be a corporation but which is in fact defectively incorporated, gives his assent to enter into the partnership relation. But the assent to enter into the relation of a voluntary arrangement for the purpose of carrying on business as associated individuals, as a question of fact, can hardly be spelled out of the mere act of an individual in purchasing stock in a going concern believed by him to be a corporation. The result of his act, if no corporation exists, may well be that no relation at all is created.

Nevertheless, although neither a partnership in fact nor a corporation exists, it does not follow that stockholders and officers of a supposed corporation who have participated in the negotiation of a contract will not be liable thereon. The facts in such a case seem sufficient to imply a warranty of authority to act for the proposed corporation and to create liability for the breach thereof according to the general principle in cases where one assumes without authority to act as an agent. *Seeberger* v. *McCormick*, 178 Ill. 404; *Trowbridge* v. *Scudder*, 11 Cush. (Mass.) 83. See PARSONS, PARTNERSHIP, 4th ed., §§ 56, 57.

It is much to be regretted that Professor Burdick in his article did not discuss certain questions as to the nature of a corporation which are suggested by his conclusions. If the shareholders of a defectively incorporated association are partners in fact, they should have the rights as well as the liabilities of partners. Hence they should be able to sue as partners. *Jones* v. *Aspen Hardware Co.*, 21 Colo. 263. If the stockholders whose attempt to create a corporation has failed by reason of non-compliance with the terms of the statute of incorporation are partners in fact, do the stockholders whose attempt succeeds continue a partnership in fact with merely certain attributes, including limited liability, annexed by the statute? See JAMES PARSONS, PRINCIPLES OF PARTNERSHIP, 2d ed., § 24. If this question be answered in the affirmative, inasmuch as a statute merely limiting liability can have no extra-territorial operation, the stockholders, remaining partners in fact, would be liable as such

for corporate acts done outside the state of charter. This result is reached in a Florida decision. *Taylor* v. *Branham*, 35 Fla. 297. Likewise an *ultra vires* act would seem to be impossible; the liability for an act exceeding the provisions of the charter would depend upon the principles determining a partner's ability to bind the firm. The stockholders would enjoy limited liability only for acts done within the powers conferred by the charter; for acts done by them in excess of these powers they would remain liable as partners to an unlimited extent. This result, it is believed, has been reached by no decision. Upon this hypothesis as to the nature of a corporation, the doctrines that a corporation has an existence outside the state of charter, and has the capacity to perform legally unauthorized acts, would be at least superfluous; the acts performed outside the state of charter or in excess of authority would be valid acts of a partnership. See MORAWETZ, PRIVATE CORPORATIONS, 2d ed., § 748.

PRINCIPAL'S LIABILITY TO THIRD PERSONS FOR AGENT'S DECEIT. — In the development of the law of agency numerous conflicting decisions have been reached as to the principal's liability for an agent's deceit where there has been no authorization express or implied. Much of this confusion seems to have arisen from the tendency of the courts to take it for granted that the action of deceit is to be governed by the rules applying to contracts made by an agent rather than by those controlling in cases of tort. In presenting a careful examination of the cases and working out a theory by which to test the decisions, a recent writer has helped to clarify the situation. *Liability for the Unauthorized Torts of Agents*, by Wm. R. Vance, 4 Mich. L. Rev. 199 (Jan., 1906).

Though the title to the article would indicate a broader scope, Professor Vance has confined his discussion mainly to actions for deceit. The question commonly arises in litigation for damages caused by the over-issue of stock certificates, or by the fraudulent issue of bills of lading. The agent of a corporation, for example, having charge of the issue of certificates of stock, for his own purposes issues spurious certificates, which are presented to a bank as collateral for a loan. The officers of the bank, on being informed by the agent that the certificates are genuine, advance the money. Or, the agent of a railway company fraudulently issues a bill of lading without having received the goods described therein. This bill comes into the hands of an innocent indorsee for value, who upon the non-delivery of the goods brings an action of deceit against the company. In these cases there is no apparent authority given by the principal to do the acts complained of. Yet some states have allowed recovery on the ground that the agent had an apparent authority by his own representations, so that the principal is now estopped to deny lack of authority in him. Professor Vance in saying that there can be no estoppel against the principal based on an unauthorized representation of authority made not by himself but by the agent, makes a proper criticism of this reasoning.[1] On the other hand, the English doctrine, followed by the Supreme Court in the case of bills of lading and approved of in the case of fraudulent issue of stock, denies liability because of the absence of any authority whatever in the agent. *Grant* v. *Norway*, 10 C. B. 665; see *Friedlander* v. *Texas & Pac. Ry. Co.*, 130 U. S. 415. If any authority from the principal is necessary in order to create liability, these cases are supportable. Professor Vance, however, submits that since the act complained of is not contractual in its nature, but tortious, the question of liability should depend not upon authority conferred, or apparently conferred, but solely on whether the agent is acting in the course of his employment — the ordinary rule in cases of torts.

The difficulty, then, is to determine whether the agent is in fact acting within the scope of his employment. In the case of the over-issue of stock it would

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[1] The result in many of the cases may, however, be supported on the ground that the principal was negligent. See *N. Y. & N. H. R. R. Co.* v. *Schuyler*, 34 N. Y. 30.